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The Draft Uniform Mediation Act in Context: Can it Clear Up the Clutter?

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THE DRAFT UNIFORM MEDIATION ACT IN CONTEXT: CAN IT CLEAR UP THE CLUTTER?*

I. INTRODUCTION

A clear analogy exists between the state of today's mediation regulation and a typical attorney's desk. An attorney's desk is full of memos and filings, projects and issues, all semi-sorted into piles, overlapping and spilling onto other piles of questions and proposed answers. Unlabeled hanging file folders of voluminous subjects, each only partially complete yet filled to capacity, evidence incoherent attempts at organization. Likewise, the attempt at regulating mediation among the states is unorganized, overlapping, incoherent, and incomplete. What the proposed Draft Uniform Mediation Act[1] attempts to do is sweep all the piles, folders, and files into the trash and replace them with one brand new, unwrinkled, neatly filled file folder of mediation regulation.[2]

In the Summer of 1999, the American Bar Association ("ABA") and the National Conference of Commissioners on Uniform State Laws ("NCCUSL") disseminated for review the first proposed Draft Uniform Mediation Act ("Draft Act").[3] "If enacted and adopted uniformly, [the Draft Act] would

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1. UNIFORM MEDIATION ACT (Draft Mar. 2000) (visited Mar. 20, 2000) <http://www.law.upenn.edu/bll/ulc/mediat/med300nc.htm> [hereinafter Draft Mar. 2000]. The first "integrated draft" was disseminated in June 1999. UNIFORM MEDIATION ACT (Draft June 1999) (visited Feb. 21, 2000) <http://www.pon.harvard.edu/guests/uma/drafts/june99.htm> [hereinafter Draft June 1999], *reprinted in* Richard C. Reuben & Nancy H. Rogers, *Major Step Forward*, DISP. RESOL. MAG., Summer 1999, at 9. Substantial changes were made in the fall of 1999 resulting in the December 1999 and January 2000 versions. *See* UNIFORM MEDIATION ACT (Draft Dec. 1999) (visited Mar. 20, 2000) <http.//www.law.upenn.edu/bll/ulc/mediat/ /med1299.htm> [hereinafter Draft Dec. 1999]; UNIFORM MEDIATION ACT (Draft Jan. 2000) (visited Mar. 20, 2000) <http://www.law.upenn.edu/bll/ulc/mediat/med100.htm> [hereinafter Draft Jan. 2000]. The most recent version is the March 2000 draft. The Draft Act will undergo an evaluation in April 2000 before being forwarded in final form to the NCCUSL in July 2000. If approved by the NCCUSL, it will be forwarded to the ABA House of Delegates for final approval in February 2001. *See* Draft Unif. Mediation Act General Information (visited Feb. 18, 2000) <http://www.pon.harvard.edu/guests/uma/info.htm> [hereinafter Draft Act General Information].

2. *See* Draft Act General Information, *supra* note 1; Reuben & Rogers, *supra* note 1, at 18.

3. Reuben & Rogers, *supra* note 1, at 18.

replace the hundreds of pages of complex and often conflicting statutes across the country with a few short pages of simple, accessible, and helpful rules."[4]

Abundant state regulation of mediation apparently reflects state policy makers' special concern with quality mediation.[5] As will be discussed in more detail in the following sections of this Comment, hundreds of state statutes, regulations, and rules address mediation in one form or another.[6] The enormous body of law varies greatly with regard to the applicable contexts and the scope of regulation.[7] California alone has eight statutes addressing mediator qualifications and ten statutes requiring mandatory use of mediation in business, family, agriculture, health and public contract disputes.[8] In all, California has over 200 statutes and rules governing or addressing mediation.[9] The trend to extensively regulate mediation is not unique to California; nearly all states and the federal courts have regulated mediation in an attempt to ensure the quality of the process.[10]

One of the major aims of the Draft Act is to provide for quality mediation procedures.[11] The Draft Act "seeks to help assure the fairness of mediation, both in fact and in perception"[12] by replacing the "tangle of legal requirements regarding mediation"[13] with three concise mediation procedure provisions.[14] The Draft Act first requires that a mediator disclose any actual or potential conflict of interest.[15] Second, the Draft Act provides that, if requested by a

4. *Id.*

5. NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY & PRACTICE § 2:04, at 17 (2d ed. 1994 & Supp. 1998).

6. *See id.* § 13:01, at 1.

7. *Id*.

8. *Id*. app. B, at 153 (Supp. 1998).

9. *ABA to Develop Model State Mediation Law*, 53 DISP. RESOL. J. 5 (1998).

10. *See* ROGERS & MCEWEN, *supra* note 5, at app. B. *See also* John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 456 (1997) (discussing Alternative Dispute Resolution programs in general and stating that in 1997 eighty out of ninety-four federal district courts had instituted programs pursuant to the Civil Justice Reform Act of 1990).

11. Draft Mar. 2000, *supra* note 1, § 9. The other major focus of the Draft Act is confidentiality. *See id.* § 4-8. Confidentiality is considered a "cornerstone" of mediation due to the question of whether a mediator or mediating parties may testify as to mediation communications should subsequent litigation arise. *See* Alan Kirtley, *Best of Both Worlds*, DISP. RESOL. MAG., Winter 1998, at 5. "There are currently more than 250 state mediation confidentiality statutes, most of which vary greatly in terms of scope and application, even within a single state." Reuben & Rogers, *supra* note 1, at 18. A uniform act is advocated to provide confidentiality protection to all types of mediations and to "mend these holes in our national statutory fabric" so that a mediator in a state with confidentiality provisions does not have to fear being called to testify in another state lacking the same confidentiality protections. *Id.*

12. Reuben & Rogers, *supra* note 1, at 18.

13. Draft Dec. 1999, Reporter's Notes, *supra* note 1, § 1.

14. Draft Mar. 2000, *supra* note 1, § 9 (a), (b), and (c).

15. *Id.* § 9(a).

party, there must be disclosure of the mediator's qualifications to mediate the dispute.[16] Finally, the Draft Act attempts to ensure quality by upholding a disputant's right to representation during mediation proceedings.[17] In addition to these provisions, earlier versions of the Draft Act contained a clause declaring that there is no immunity from civil liability for mediators other than that provided under common law judicial immunity for court-connected mediators.[18] The immunity provision, however, has since been deleted. As currently written and if adopted by the states, the Draft Act's provisions for quality mediation procedures will apply (1) when a dispute is referred or ordered to mediation by a court, government entity or mediator and (2) where the parties enter into a written or electronically recorded agreement to mediate.[19]

This Comment discusses the Draft Act's contextual applicability and its provisions for quality mediation procedures.[20] Section II provides a historical overview of the institutionalization of mediation leading to the enactment of numerous state regulations and ultimately the drafting of a uniform act. Section III examines the scope of the Draft Act's applicability and compares the provisions purporting to ensure quality mediation procedures with the existing state laws the Draft Act will attempt to replace. In Section IV, this Comment turns to the questions of whether the Draft Act is aimed at the proper mediation contexts. Where the Draft Act is aimed at the proper mediation contexts, this Comment will address whether the methods employed in the Draft Act can be effective without a loss of the advantages of mediation. It will be argued that although uniform regulation ensuring quality procedures in court referred and court ordered mediation is well founded, the Draft Act may fail to unify the states on all salient issues, and it inappropriately applies to private mediation. Finally, Section V concludes that the Draft Act is a commendable effort but its broad applicability may prevent it from clearing up the clutter of mediation regulation.

II. HISTORY: THE INSTITUTIONALIZATION AND REGULATION OF MEDIATION

Mediation is an alternative to litigation where disputing parties agree to use an impartial third party to aid in the negotiation process.[21] It is meant to be an

16. *Id.* § 9(b).

17. *Id.* § 9(c).

18. *See* Draft Jan. 2000, *supra* note 1, § 3(b); Draft June 1999, *supra* note 1, § 4(b).

19. *See* Draft Mar. 2000, *supra* note 1, § 3 (defining mediation, mediator and disputant).

20. This Comment will not discuss the Confidentiality Provisions of the Draft Act. For a discussion of the subject see ROGERS & MCEWEN, *supra* note 5, § 9:01, and Kirtley, *supra* note 11.

21. *See* BLACK'S LAW DICTIONARY 981 (6th ed. 1990). Definitions of mediation have varying language; however, the definitions almost always encompass the aspects of (1) agreement of the parties to negotiate, (2) with the aid of a neutral mediator, and (3) in hopes of leading to a

informal and simple process.[22] The key is that a neutral person, a third party, or a person with no "direct stake" in the dispute aids, facilitates, or participates in the negotiations.[23] The neutral party does not resolve the dispute, however.[24] In fact, there is no guarantee that the dispute will be resolved at all through the mediation process since resolution depends on the voluntary consent and agreement of all disputing parties.[25] If the dispute is resolved, however, and the parties reach an agreement, the written settlement contract has the same binding effect on the parties as any other compromise or settlement. Thus, traditional contract principles control.[26]

Compared to litigation, mediation has the potential of "reducing the cost, time, and stress of dispute resolution. . . . In appropriate cases, mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly."[27] Mediation tends to decrease the time it takes litigating

consensual resolution. *See* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 12 (1994) ("Mediation is the process where the third party neutral, whether one person or more, acts as a facilitator to assist in resolving a dispute between two or more parties."). *See also* WYO. STAT. ANN. § 1-43-101 (Michie 1977) (defining mediation as "a process in which an impartial third person facilitates communication between two (2) or more parties in conflict to promote reconciliation, settlement, compromise or understanding"); IND. CODE ANN. § 34-6-2-78 (West 1999) (defining mediation as "a process where at least two (2) disputing parties choose to be guided to a mutually agreeable solution with the aid of a mediator"); ALA. CODE § 6-6-20 (1998) (stating that mediation means "a process in which a neutral third party assists the parties to a civil action in reaching their own settlement but does not have the authority to force the parties to accept a binding decision"). However, some states have different definitions depending upon the context. For example, Michigan defines medical malpractice mediation as a panel of five members who evaluate the dispute and make specific findings. MICH. COMP. LAWS §§ 600.4905(1), 600.4915 (1996).

22. Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEG. L. REV. 71, 92 (1998) (quoting Professor Lon Fuller who stated that "the central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship"); ROGERS & MCEWEN, *supra* note 5, § 13:01, at 1.

23. SAM KAGEL & KATHY KELLY, THE ANATOMY OF MEDIATION: WHAT MAKES IT WORK 185 (1989).

24. *See* Chris Guthrie & James Levin, *A 'Party Satisfaction' Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 890 (1998) (stating that a mediator has no authority to impose a decision, as a judge or arbitrator can).

25. KAGEL & KELLY, *supra* note 23, at 190-92.

26. ROGERS & MCEWEN, *supra* note 5, § 4:14. *See, e.g.*, LA. REV. STAT. ANN. § 9:4111 (West Supp. 1999) (stating that if the parties to mediation agree to settle, "the agreement is enforceable as any other transaction or compromise").

27. CAL. CIV. PROC. CODE § 1775 (West 1982).

parties to reach a settlement;[28] thus, it is favored for efficiency reasons. On a more personal level, however, mediation is favored because it necessarily "produces a solution that is agreeable to everyone" due to its requirement of voluntary agreement to settle.[29] The mediator's role as a counselor to both parties acts as a "stabilizing, rational influence" giving the parties the opportunity to "openly vent their hostilities,"[30] thereby leading to a general reduction of present and future conflict among the parties.[31]

Mediation is said to reduce hostility and allow disputing parties to control the outcome rather than leaving the decision to an unrelated party's binding determination.[32] With an "emphasis on neutrality, individual responsibility, and mutual fairness," it has been noted that "[m]ediation, as an alternative to the adversarial system, is less hemmed in by rules of procedure, substantive law, and precedent."[33] Thus, mediation allows the parties to find a resolution that suits them, even to the extent that the terms of the agreement are "wholly outside the realm of the law."[34] For instance, parties can agree to alternatives beyond the limited legal remedies in an effort to bring satisfaction to all involved.[35]

28. Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 837 (1998) [hereinafter Rogers & McEwen, *Employing the Law*].

29. KAGEL & KELLY, *supra* note 23, at 191.

30. Deborah R. Sundermann, *The Dilemma of Regulating Mediation*, 22 HOUS. L. REV. 841, 845 (1985).

31. *Id.* at 842, 864. Despite general support, some disputes have been deemed inappropriate for mediation. It has been argued that *Brown v. Board of Education*, 349 U.S. 294 (1955), the landmark civil rights decision by the United States Supreme Court, is the paradigmatic example of a case inappropriate for mediation because the racial climate at the time would not have supported a voluntary end to segregation. In addition, the constitutional precedent handed down by the Supreme Court would have been lost and would not have been available for subsequent civil rights cases. Nonetheless, there is agreement that mediation is not necessarily inappropriate in all civil rights cases. The decision of whether to litigate or mediate may depend on whether a precedent needs to be set or whether the parties want to "change custom and orientation at a deeper level . . . ." Steven Keeva, *When Mediation Doesn't Work*, A.B.A. J., Oct. 1999, at 88 (quoting Margaret Herman, University of Georgia, Athens).

32. Sundermann, *supra* note 30, at 847. *See also* Guthrie & Levin, *supra* note 24, at 890 (discussing party satisfaction in mediation).

33. Alison Smiley, *Professional Codes and Neutral Lawyering: An Emerging Standard Governing Nonrepresentational Attorney Mediation*, 7 GEO. J. LEGAL ETHICS 213, 217-18 (1993).

34. Sundermann, *supra* note 30, at 847. *See also* Smiley, *supra* note 33, at 217 (stating that parties are encouraged to "consider societal norms, applicable law, and other factors they deem relevant in reaching resolution").

35. Sundermann, *supra* note 30, at 847. "For example, if Aristotle accuses Brutus of vandalizing his house, but cannot legally prove it, Brutus can agree to 'stop' vandalizing the house if Aristotle will stop kicking Brutus' dog. The disputants and the mediator generate

The most basic form of mediation, two persons seeking the help of a third person to end a dispute, is claimed to be older than the *Bible*.[36] In fact, use of mediation as the primary rather than the alternative means of conflict resolution can be traced to ancient China over two thousand years ago.[37] However, mediation contexts today have expanded beyond this raw form. They now include professional mediation services offered to the public by individuals purporting to be mediators by trade and to court referred and court ordered mediation programs, acting as a supplement to or replacement of the litigation process. As discussed below, these newly created forms constitute the institutionalization of mediation and have spawned the extensive mediation regulation that exists today.[38]

A. The Institutionalization of Mediation

Although use of mediation likely existed in the United States from its beginnings when European colonists attempted to settle their own disputes, organized use of mediation first arose with the labor movement in the late 1800s.[39] In 1913, Congress created the Department of Labor and appointed the Secretary of Labor to act as mediator of labor and union disputes to expedite resolution and avoid strikes.[40] With an increased need for mediation services, Congress then created the Federal Mediation and Conciliation Service (FMCS) in 1947.[41] The FMCS had jurisdiction over and provided mediation for industry disputes affecting interstate commerce, private non-profit health facilities, and federal government agencies.[42]

The use of mediation moved beyond labor and industry disputes in the 1960s when the American Arbitration Association began establishing and privately funding neighborhood mediation projects.[43] The projects provided low-cost dispute resolution services to the public as an alternative to litigating minor disputes.[44] By the 1970s, several major cities had instituted similar mediation programs.[45]

alternatives that arise from the totality of the specific facts. The forum institution imposes no rule of law; no precedent is set or followed." *Id.*

36. KOVACH, *supra* note 21, at 18.
37. *Id.* at n.14.
38. *See generally id.* at ch. 2.
39. *Id.* at 18–20; ROGERS & MCEWEN, *supra* note 5, § 5:01, at 1.
40. KOVACH, *supra* note 21, at 20.
41. *Id. See also* ROGERS & MCEWEN, *supra* note 5, § 5:01, at 1.
42. KOVACH, *supra* note 21, at 20.
43. *See id.* at 21; Sundermann, *supra* note 30, at 843.
44. KOVACH, *supra* note 21, at 21.
45. Sundermann, *supra* note 30, at 843. *See also* KOVACH, *supra* note 21, at 21.

In the 1970s, the use of mediation "generated widespread attention among the public, bar, and judiciary."[46] Increased caseloads created a "renewed interest among jurists in the greater efficiency of consensual dispute resolution compared to traditional court processes," and alternative methods of dispute resolution, as a part of the court system, were given a "fresh, hard look."[47] In 1971, one of the first court sponsored mediation programs was created in Columbus, Ohio.[48] Law Student mediators assisted in resolving minor criminal actions as part of the City Prosecutor's Office.[49] The concept was adopted in New York City in 1975 with the opening of the Institute for Mediation and Conflict Resolution.[50]

Although these programs were praised and encouraged, the modern movement towards court sponsored mediation did not escalate until the Pound Conference in 1976.[51] The Pound Conference focused on the perceived public dissatisfaction with the American legal system, including the overcrowded, expensive courts, and the participants of the Conference searched for ways to increase access to justice.[52] As a result, Neighborhood Justice Centers, later renamed Dispute Resolution Centers, were created to provide mediation services at low cost to disputing parties after referral by local courts.[53] Court referral to Dispute Resolution Centers led to the direct use of mediation in the court system, and "the idea of a 'multi-door' courthouse began to surface."[54] Over time, legislatures began granting courts the authority to mandate that parties attempt mediation prior to, or as part of, the litigation process.[55]

46. ROGERS & MCEWEN, *supra* note 5, § 5:02, at 4.

47. *Id*. (quoting Chief Justice Warren E. Burger from his remarks at the Arthur T. Vanderbilt dinner on November 18, 1982).

48. KOVACH, *supra* note 21, at 21.

49. *Id.*

50. *Id.*

51. *Id. See also Legislation on Dispute Resolution*, A.B.A. STANDING COMMITTEE ON DISP. RESOL. 2 (1990) [hereinafter *Legislation* 1990].

52. Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 865, 866 & n.5 (1998); KOVACH, *supra* note 21, at 21.

53. KOVACH, *supra* note 21, at 22.

54. *Id.* A "multi-door courthouse" is one in which an individual with a dispute can choose alternatives to the traditional litigation process. *Id.* S*ee also* ROGERS & MCEWEN, *supra* note 5, § 5:03, at 12.

55. KOVACH, *supra* note 21, at 23, 48 (noting that federal courts often rely on Rule 16). The trend was especially prevalent in the family dispute arena. Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalism*, 1997 BYU L. REV. 687, 690 (1997).

B. Regulating Institutionalized Mediation

The use of mediation in conjunction with the litigation process continued to increase, and consequently, numerous state regulations were enacted.[56] New York passed the first court-related dispute resolution law, including specific mediation provisions, in 1981.[57] The law gave New York courts the authority to "grant adjournments in contemplation of dismissal for certain criminal proceedings on the condition that the party(ies) participate in dispute resolution."[58] The law stated that mediators utilized in the program had to obtain twenty-five hours of training in conflict resolution and that all communications relating to the mediation were confidential.[59]

The institutionalization of mediation was praised for its efficiency and cost effectiveness, and expansion of similar programs was advocated.[60] At a dispute resolution conference in 1983, the Honorable Lawrence H. Cooke stated:

> Mediation . . . must move onward. It must consider entering more comprehensively into less explored areas. . . . Undoubtedly, the most compelling need of mediation, if it is to function well, is that it be institutionalized. Mediation must be incorporated into existing judicial structures.[61]

Judge Cooke's advice was apparently heeded. By 1984, Colorado and Oklahoma had joined New York in passing comprehensive Dispute Resolution Acts instituting court related mediation programs,[62] five states had adopted family and divorce mediation laws, and six states had appropriated state funds to mediation.[63] The trend continued throughout the 1980s, and in 1990 the ABA Standing Committee on Dispute Resolution reported the existence of

56. Kimberlee K. Kovach, *Good Faith in Mediation – Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 576-77 (1997) ("As a catalyst for, and a result of, the expanded use of mediation, a plethora of laws have been enacted."). *See also* James J. Brudney, *Mediation and Some Lessons from the Uniform State Law Experience*, 13 OHIO ST. J. ON DISP. RESOL. 795, 799-801 (1998) (discussing the "current regulatory setting"); ROGERS & MCEWEN, *supra* note 20, app. B (listing all state and federal statutes concerning mediation).

57. *State Legislation on Dispute Resolution*, A.B.A. SPECIAL COMMITTEE ON ALTERNATIVE MEANS OF DISP. RESOL. 2 (1982)(citing S6369-B; Ch. 847 of the laws of 1981 and stating that "New York has the distinction of being the first and only state to pass a comprehensive dispute resolution law"). Noted advantages of the law include its promotion of the "whole concept of mediation in New York." *Id.* at 3.

58. *Id.* at 4.

59. *Id.* at 4-5.

60. Lawrence H. Cooke, *Mediation in the 80's: Where are We Headed?*, *in* PROBLEM SOLVING THROUGH MEDIATION 18 (Maria R. Volpe & Thomas F. Christian eds., 1984).

61. *Id.*

62. *Legislation on Dispute Resolution*, A.B.A. SPECIAL COMMITTEE ON DISP. RESOL. 1 (1984).

63. *Id.*

nearly 200 state statutes dealing with mediation.[64] As stated in the Committee's report, "in the 80's [dispute resolution processes such as mediation] were rediscovered, expanded, and applied to almost every conceivable area capable of fomenting dispute"[65] and "[t]he recent legislation boom is testament to its widespread acceptance."[66]

Between 1989 and 1993, mediation legislation increased from 517 pages of edited statutes to over 2000 individual state statutes concerning mediation.[67] Hundreds of the currently enacted state statutes are limited to provisions authorizing the use of mediation in given contexts[68] or by state administrative agencies.[69] Many others merely encourage the use of mediation[70] or provide funding for state sponsored mediation centers.[71] The remaining statutes purport to regulate everything from mediator qualifications to party privileges yet often apply to only court ordered or court referred mediation sessions.[72]

This abundance of regulation has been criticized as confusing, incoherent, and complex.[73] As stated by James Alfini, chair of the ABA Section of Dispute Resolution: "Those participating in mediation often face divergent provisions for different mediation contexts, even within the same state."[74] Professor Joseph Stulberg[75] stated that "while the use of mediation has expanded, a common understanding as to what constitutes mediation has weakened. It is important . . . to identify and clarify the principles and

64. *See Legislation* 1990, *supra* note 51, at 1-2 (reporting 300 Alternative Dispute Resolution statutes of which 181 were mediation statutes).

65. *Id*. at 2.

66. *Id*. at 4.

67. ROGERS & MCEWEN, *supra* note 5, § 13.01.

68. Rogers & McEwen, *Employing the Law*, *supra* note 28, at 863. *See, e.g.*, LA. REV. STAT. ANN. § 37:381 (West 1988) *and* KAN. STAT. ANN. § 65-1824 (1992) (authorizing the board of the barbershop industry to act as mediator in any controversy between barbers); ME. REV. STAT. ANN. tit. 19-A § 1084 (West 1998) (allowing courts to refer grandparent visitation rights disputes to mediation); MASS. GEN. LAWS ch. 94A § 2 (1997) (granting the Commissioner the power to mediate disputes between milk producers and dealers).

69. *See, e.g.*, IND. CODE § 4-21.5-3.5-1 (1999).

70. *See, e.g.*, 710 ILL. COMP. STAT. 20/1 (West 1999) (encouraging not-for-profit dispute resolution centers).

71. *See, e.g.*, ARK. CODE ANN. § 16-7-203 (Michie 1999).

72. *See* ROGERS & MCEWEN, *supra* note 5, § 13:02, at 4 and app. B.

73. *See, e.g.*, Guthrie & Levin, *supra* note 24, at 885 (characterizing legislation as the "current patchwork of often confusing and conflicting mediation laws").

74. *Legal Groups Invite Comment on Draft of Proposed Uniform Mediation Act for States*, U.S.L.W., Aug. 31, 1999, at 2127 [hereinafter *Legal Groups*].

75. Joseph Stulberg is a professor of law and Director of Advanced Studies at the University of Missouri – Columbia School of Law. *See* Brudney, *supra* note 56, at n. a1.

dynamics which together constitute mediation as a dispute settlement procedure."[76]

Within the past several years, the creation of a uniform act for mediation has been increasingly advocated.[77] Nancy Rogers,[78] a lead proponent of a uniform mediation act, gave three reasons supporting its inception:

> First, an act would present an opportunity to establish a level playing field. Second, it might increase the predictability and reliability of how the many states would deal with certain legal questions. . . . Third . . . since many states have not examined statutory solutions, a uniform statute might provide for more thoughtful solutions.[79]

In January of 1998, the National Conference of Commissioners on Uniform State Laws appointed a committee to draft a proposed uniform mediation act.[80] The NCCUSL committee was appointed to work with the ABA Section of Dispute Resolution on the project.[81] A paper presented at the August 1998 annual ABA meeting explained the need for a uniform mediation act: "Over the last 15 years, mediation-related law has grown from a few statutes to thousands of statutes, rules and regulations. The person seeking to understand these laws faces formidable barriers."[82] The authors of that paper also stated that researching the reach of current mediation statutes is often difficult because the statutes take "diverse approaches for different types of disputes."[83]

Uniform acts are generally drafted by the NCCUSL to "promote uniformity in the law among the several states on subjects as to which uniformity is desirable and practicable."[84] The NCCUSL has done so in various areas, demonstrated by the overwhelming state acceptance of the Uniform Commercial Code,[85] the Uniform Child Custody Jurisdiction Act,[86]

76. Kovach & Love, *supra* note 22, at 108 (citing Joseph Stulberg, *The Theory and Practice of Mediation*, 6 VT. L. REV. 85 (1981)) [hereinafter Stulberg, *Theory and Practice*].

77. *Legal Groups*, *supra* note 74, at 2127 (stating that the drafting project began in the fall of 1997).

78. Nancy Rogers is a professor of law and Vice Provost at the Ohio State University. She also serves as the general coordinator of the Mediation Law Project. Reuben & Rogers, *supra* note 1.

79. Christian Duve, *Uniform Mediation Law: Do We Really Want Harmony?*, 15 ALTERNATIVES TO THE HIGH COST OF LITIGATION 126 (1997).

80. *ABA Meeting Examines Uniform Mediation Act*, 53 DISP. RESOL. J. 6 (1998).

81. *Id.*

82. *Id.*

83. *Id.*

84. Brudney, *supra* note 56, at 796.

85. Adopted by all fifty states, the District of Columbia and the Virgin Islands. *Id.* at 826.

86. Adopted by all fifty states, the District of Columbia and the Virgin Islands. *Id.* at 824.

the Uniform Controlled Substances Act,[87] the Uniform Enforcement of Foreign Judgments Act,[88] and many others.[89]

The goal of a uniform act for mediation would be to add clarity to mediation regulation[90] by "replac[ing] these statutes with a short and easily understandable statute that would provide important guidance on certain fundamental aspects of mediation, while at the same time permitting the flexibility that is so necessary to the process."[91] Consequently, a uniform act would be designed to "enhance, rather than interfere with, the expanded use of mediation and contribute to improving its effectiveness."[92]

The first version of the Draft Act was disseminated for review in June 1999.[93] After soliciting comments from legal and mediation professionals, the NCCUSL committee met again in October 1999 to incorporate suggestions, culminating in the December 1999 version of the Draft Act.[94] The language and structure were fine-tuned in the January and March 2000 drafts, and the final draft is expected to be forwarded to the NCCUSL in July 2000.[95] After approval, the proposed legislation will be forwarded to the ABA House of Delegates in February 2001 and then to the states for adoption.[96] As stated by Professors Richard C. Reuben[97] and Nancy H. Rogers,[98] "the Uniform Mediation Act presents an unprecedented opportunity for the nation's

87. Adopted by all fifty states and the District of Columbia. *Id.* at 825.

88. Adopted by forty-six states. *Id.* at 828.

89. *See* Brudney, *supra* note 56, at 827-29. Not all proposed uniform acts have been immediately successful. For example, although the current Uniform Arbitration Act has been in existence for forty-two years and has been adopted by thirty-five states, its success was not easily achieved. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 28 (1995). The first attempt at a Uniform Arbitration Act failed, and it was ultimately deemed inactive in 1943. *Id.* at n.45. In 1957, however, a second Uniform Arbitration Act was attempted, and it was steadily adopted by the states over the following years. *See* Brudney, *supra* note 56, at 827.

90. Michael B. Getty et al., *Symposium on Drafting a Uniform/Model Mediation Act: Preface*, 13 OHIO ST. J. ON DISP. RESOL. 787 (1998).

91. *Legal Groups*, *supra* note 74, at 2127.

92. Getty et al., *supra* note 90, at 788.

93. *See* Draft Act General Information, *supra* note 1; Draft June 1999, *supra* note 1.

94. *See* Draft Act General Information, *supra* note 1; Draft Dec. 1999, *supra* note 1.

95. *See* Draft Jan. 2000, *supra* note 1; Draft Mar. 2000 *supra* note 1; Draft Act General Information, *supra* note 1; Reuben & Rogers, *supra* note 1, at 19. The Conference will decide by vote of state representatives, one vote per state, whether to promulgate the draft as a uniform act. It must be approved by a majority vote. Brudney, *supra* note 56, at 798-99.

96. *See* Draft Act General Information, *supra* note 1; Reuben & Rogers, *supra* note 1, at 19. *See also* Brudney, *supra* note 56, at 809-13 (discussing various themes of successful adoption).

97. Richard C. Reuben is a senior research fellow at the Harvard Negotiation Research Project at Harvard Law School and the Reporter for the ABA Section of Dispute Resolution Drafting Committee. *See* Reuben & Rogers, *supra* note 1, at 19.

98. *See supra* text accompanying note 78.

mediation community to elevate the field by working together to craft minimal but meaningful protections for the process and its participants."[99]

III. THE CURRENT STATE OF AFFAIRS AND THE PROMISE OF THE DRAFT ACT

As stated in the Introduction to this Comment, the Draft Act's definitions of disputant, mediation, and mediator form the contexts in which the Draft Act is to apply. The Draft Act states that

> (a)"Disputant" means a person who participates in mediation and:
>
> > (1) has an interest in the outcome of the dispute or whose agreement is necessary to resolve the dispute, and
> > (2) is asked by a court, government entity, or mediator to appear for mediation or entered an agreement to mediate that is evidenced by a record.[100]
>
> (b) "Mediation" means a process in which disputants in a controversy, with the assistance of a mediator, negotiate toward a resolution of the conflict that will be the disputant's decision.[101]
>
> . . .
>
> (d) "Mediator" means an impartial individual of any profession or background, who is appointed by a court or government entity or engaged by disputants through an agreement evidenced by a record.[102]

By these definitions, the Draft Act purports to regulate mediation in two very broad contexts: (1) private mediation in which the parties enter into a written or electronically recorded agreement and (2) court or government sponsored mediation.[103] Further, the Draft Act does not distinguish between types of disputes, for instance domestic and criminal or business and agricultural, but instead applies uniformly to all disputes.[104]

Generally, the states have not taken a similar approach. Many state statutes apply only to court referred or court ordered mediation,[105] granting courts the authority to refer or order disputes to mediation and then setting

99. Reuben & Rogers, *supra* note 1, at 19.

100. Draft Mar. 2000, *supra* note 1, § 3(a). "Record" is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." *Id.* § 3(g).

101. *Id.* § 3(b).

102. *Id.* § 3(d).

103. *See id.* § 3.

104. *See* Draft Mar. 2000, *supra* note 1, § 3.

105. Court ordered or court referred mediation is also commonly referred to as court-annexed or mandatory mediation. *See* Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1091-96 (1990) [hereinafter *Mandatory Mediation*].

guidelines and standards for the court-connected mediation sessions.[106] As discussed in conjunction with the quality provisions to follow, many states require confidentiality, disclosure, and mediator immunity when mediation is a result of a court referral or order.[107]

Likewise, few states have enacted comprehensive mediation acts applicable to all types of disputes.[108] Legislation is more often categorized in accordance with substantive law.[109] For instance, the California Code contains separate provisions for family,[110] labor,[111] attorney discipline,[112] truancy,[113] planning and zoning,[114] water rights,[115] unemployment compensation,[116] Native American historical site disputes[117] and more.[118]

It is claimed that distinct provisions may better address subject-specific issues.[119] The regulation of family dispute mediation illustrates this claim. Divorce, child custody, paternity and other family disputes likely involve emotional as well as legal issues.[120] Therefore, the issue of attorney representation is unique in that bargaining power may be greatly unbalanced and the parties' view of economic concerns may be fogged by emotions.[121] In addition, mediator qualifications are especially significant because divorce, domestic violence, and child custody mediations may include an aspect of counseling.[122] In fact, many states have exempted domestic violence cases from mandatory dispute programs due to the sensitive issues raised.[123] Emotions and counseling may not weigh as heavily in non-domestic disputes

106. *Id*. n. 34 (citing for example MINN. STAT. § 484.74 (1990)).

107. *See generally id.* (discussing ways to ensure fair and efficient mandatory mediation programs).

108. *But see* Louisiana Mediation Act, LA. REV. STAT. ANN. § 4101 - 4112 (West Supp. 1999) *and* Kansas Dispute Resolution Act, KAN. STAT. ANN. § 5-501 – 5-516 (1995).

109. *See* ROGERS & MCEWEN, *supra* note 5, § 12 (discussing issues related to specific types of disputes which justify including mediation statutes within substantive laws).

110. CAL. FAM. CODE § 3160-3161 (West 1994).

111. CAL. LAB. CODE § 65 (West 1989).

112. CAL. BUS. & PROF. CODE § 6086.14 (West 1990).

113. CAL. WELF. & INST. CODE § 601.3 (West 1998).

114. CAL. GOV'T CODE § 66031 (West 1997).

115. CAL. WATER. CODE § 1219 (West 1971).

116. CAL. UNEMPL. INS. § 1282 (West 1986).

117. CAL. PUB. RES. CODE § 5097.94 (West 1984).

118. *See* ROGERS & MCEWEN, *supra* note 5, § 13.01, at 2 & app. B.

119. Professor Stulberg of the University of Missouri-Columbia argues against a uniform mediation law because of the complication created by the broad variety of fields where mediation is applied. *See* Duve, *supra* note 79. *See also* ROGERS & MCEWEN, *supra* note 5, § 12.

120. ROGERS & MCEWEN, *supra* note 5, § 12:02.

121. *Id.* § 12:02, at 2-3.

122. *Id.*

123. *Id.* § 12:02, at 9.

such as business or corporate disputes, thus making attorney representation and qualifications less of an issue.[124]

Another example of the professed need for subject-specific regulation is within the labor and employment field. States such as California, Connecticut, Kentucky, Maryland, Massachusetts, and North Carolina make distinctions between labor and other types of disputes when regulating for confidentiality.[125] For labor disputes, confidentiality requirements apply only to the mediator or mediation agency and not to all mediation communication; in other types of disputes, confidentiality applies to all parties.[126]

Nonetheless, there has been some attempt among the states to regulate varying disputes in a more uniform fashion than provided in subject-specific regimes. For instance, in Kansas, separate statutory provisions existed to regulate mediation confidentiality for employment, child custody, and environmental disputes.[127] However, in 1996, the Kansas legislature amended the various statutes to reflect identical provisions.[128]

Instead of a subject-specific approach, the drafters of the Draft Act attempted to maintain a broad focus, covering only those aspects of mediation common to all types of disputes while leaving flexibility for local variations and supplements.[129] In doing so, the Draft Act has three concise provisions to ensure quality mediation procedures in all types of disputes.[130] The Draft Act requires mediator disclosure of any conflicts of interest,[131] provides for disclosure of mediator qualifications when requested,[132] and ensures a party's right to representation.[133] Although not included in the current version of the Draft Act, previous versions limited mediator immunity to common law immunity for court-connected mediators.[134] In the following sections, this Comment will explore the Draft Act quality provisions and offer a comparison between them and the closely related state laws already in effect, paying particular attention to contextual applicability.

124. *Compare* ROGERS & MCEWEN, *supra* note 5, § 12:02, *with id.* ch. 12:03.

125. *Id.* § 12:08, at 29 & n.5.

126. *Id.*

127. *See* ROGERS & MCEWEN, *supra* note 5, § 12:01, at 1.

128. *Id.* § 13:02, at 111.

129. *See* Draft Dec. 1999, Reporter's Notes, *supra* note 1, § 1.

130. *See* Draft Mar. 2000, *supra* note 1, § 9 (formerly section 3 of the January version and section 4 of the June and December versions).

131. *See* Draft Mar. 2000, *supra* note 1, § 9(a).

132. *See id.* § 9(b).

133. *See id.* § 9(c).

134. *See* Draft Jan. 2000, *supra* note 1, § 3(b).

A. Disclosure

The Draft Act contains two disclosure provisions; one pertaining to conflicts of interest disclosure and the other to qualifications disclosure. The conflicts of interest provision states:

> Before accepting appointment or engagement a mediator shall make an inquiry that is reasonable under the circumstances to determine whether there are any facts that a reasonable person would consider likely to affect the impartiality of the mediator, including any financial or personal interest in the outcome of the mediation or existing or past relationships with a disputant or any known or foreseeable participant in the mediation.[135]

Regarding qualifications, the Draft Act requires that "[i]f asked by a disputant, a mediator shall disclose the mediator's qualifications to mediate a dispute."[136]

The first version of the Draft Act differed from the subsequent versions in that it required the parties to request disclosure of both conflicts of interest and qualifications prior to obligating the mediator to disclose the information.[137] The current version, as stated, mandates disclosure of conflicts of interest in the absence of a request while disclosure of qualifications is only required upon request.[138] The change was apparently made due to the importance of the knowledge of a conflict of interest prior to mediation.[139] The drafters contend, in the Reporter's Notes to the section, that requiring disclosure of conflicts of interest and, upon request, qualifications, "sets a minimum standard."[140] They further contend that the disclosure requirement, applicable to both court-connected and private mediators, "promot[es] the market place as a check on quality among prospective mediation clients."[141]

It should be noted that the Draft Act "does not establish or call for mediator qualifications" due to the wide variance in what qualifies a mediator for a given dispute.[142] The Reporter's Notes state that "[q]ualifications may be important, but they need not be uniform" due to the variety of contexts in which the Draft Act will apply and the "unique characteristics that may qualify a particular mediator for a particular mediation."[143]

Like the Draft Act, some states have attempted to regulate the quality of mediation by requiring disclosure in certain mediation contexts.[144] In the

135. *See* Draft Mar. 2000, *supra* note 1, § 9(a).
136. *Id.* § 9(b).
137. Draft June 1999, *supra* note 1, § 4(a).
138. *See* Draft Jan. 2000, *supra* note 1, § 3(a).
139. *See* Draft Dec. 1999, Reporter's Notes, *supra* note 1, § 4(a).
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *See, e.g.*, S.D. CODIFIED LAWS § 25-4-58.2 (Michie 1999); LA. REV. STAT. ANN. § 9:4107 (West Supp. 1999).

following sections, state regulation regarding disclosure of conflicts of interests and disclosure of qualifications will be discussed in turn.

1. Disclosure of Conflicts of Interest

It is claimed that disclosure of potential conflicts of interest increases parties' confidence in the process by ensuring impartiality.[145] In a South Dakota statute, the legislature proclaimed that because mediation is based on "participation and self-determination of the parties,"[146] the parties' confidence in the mediator and willingness to cooperate is important, and knowledge that the mediator is impartial may increase the parties' acceptance of the process. Based on that principle, South Dakota requires that family court mediators "fully disclose to all parties involved in the mediation any actual or potential conflicts of interest."[147] Self-withdrawal is expected if the mediator believes that impartiality is impossible or if either party requests withdrawal after full disclosure.[148]

Louisiana has a similar provision requiring disclosure of potential conflicts of interest.[149] As part of the Louisiana Mediation Act,[150] upon motion of both parties to a dispute, the court may refer a civil case to mediation and the assigned mediator is required to disclose "all past or present conflicts or relationships with the parties or their counsel."[151] Likewise, in a very narrowly applicable statute, Vermont requires disclosure of conflicts of interest by mediators in mobile home park disputes.[152] The statute identifies potential conflicts of interest as "any experience as a mobile home park owner, resident or leaseholder."[153]

In addition to these state statutes, the Model Standards of Conduct for Mediators ("Model Standards"), developed jointly by the ABA, American Arbitration Association, and the Society of Professionals in Dispute Resolution, advanced a concept similar to the Draft Act's disclosure provision.[154] The Model Standards, intended to be guidelines for mediators and to encourage high quality mediation,[155] suggest that "a mediator shall

145. Carole Silver, *Models of Quality for Third Parties in Alternative Dispute Resolution*, 12 OHIO ST. J. ON DISP. RESOL. 37, 53 (1996).

146. S.D. CODIFIED LAWS § 25-4-58.2 (Michie 1999).

147. *Id.*

148. *Id.*

149. *See* LA. REV. STAT. ANN. § 9:4107 (West Supp. 1999).

150. *See* LA. REV. STAT. ANN. § 4101- 4112 (West Supp. 1999).

151. LA. REV. STAT. ANN. § 9:4107.

152. VT. STAT. ANN. tit. 10, § 6252 (1997).

153. *Id.* Regulation of this type of conflict, a perceived conflict stemming from closeness in circumstances, is referred to as "restriction." *See* Silver, *supra* note 145, at 53–56.

154. Model Standards of Conduct for Mediators, *reprinted in* Feerick, *supra* note 10, at 478.

155. *Id.* at 459.

disclose all actual and potential conflicts of interest reasonably known to the mediator" and then decline to act as the mediator if any party does not consent.[156] The Model Standards state that especially sensitive conflicts of interest, which should be disclosed in all cases, include past personal or professional relationships with the disputants or the attorneys and a financial or personal interest in the outcome of the mediation.[157]

2. Disclosure of Qualifications

Disclosure of qualifications, compared to disclosure of conflicts of interest, has been called a more novel requirement.[158] Very few states require disclosure of qualifications. One of the few examples is the Louisiana Mediation Act.[159] It requires disclosure of professional qualifications for court appointed mediators and states that "upon receiving notice of appointment as a mediator in a particular proceeding, the mediator shall make available to all parties a list of his professional qualifications, curriculum vitae, and fee schedule."[160]

Regardless of disclosure requirements, qualification standards have been deemed "[o]ne of the most controversial issues in the Alternative Dispute Resolution (ADR) field."[161] Yet, among forty states there are over one hundred statutes requiring entry-level mediator qualifications in at least some types of court referred or court ordered mediation.[162] However, there is no real similarity among the states; some regulations require certain educational degrees, others merely require experience.[163]

For example, the Florida Standards of Professional Conduct require mediators to acquire knowledge and training in the mediation process and to understand the appropriate professional ethics standards, but it does not enumerate standards of qualification.[164] Conversely, the Louisiana Mediation Act requires forty hours of classroom training in mediation and, if not licensed to practice law, 500 hours of dispute resolution prior to being appointed as a qualified mediator.[165]

156. *Id.* at 464.

157. *Id.*

158. *See* Draft Dec. 1999, Reporter's Notes, *supra* note 1, § 4(a).

159. LA. REV. STAT. ANN. § 9:4107.

160. *Id.*

161. Harges, *supra* note 55, at 687.

162. *See* ROGERS & MCEWEN, *supra* note 5, § 11:02, at 4. Note that most qualification statutes apply only in child custody disputes. *See* Paul F. Devine, *Mediator Qualifications: Are Ethical Standards Enough to Protect the Client?*, 12 ST. LOUIS U. PUB. L. REV. 187, 204 (1993).

163. Devine, *supra* note 162, at 204.

164. FLA. STAT. ANN. Mediator Rule 10.120 (West 1992).

165. LA REV. STAT. ANN. § 9:4106A (West Supp. 1999). The Louisiana Mediation Act also requires that a qualified mediator participate in ten hours of annual training to maintain a listing

California alone has an abundance of qualifications which vary depending upon the nature and context of the dispute.[166] The California Rules of Court provide that court-connected mediators of child custody and visitation disputes should "undergo a minimum of 40 hours of mediation training within their first six months of employment," have two years experience in court mediation, demonstrate competence, and meet the statutory education and experience qualifications.[167] The statutory qualifications of the California Family Code require:

> (1) A master's degree in psychology, social work, marriage, family and child counseling, or other behavioral science substantially related to marriage and family interpersonal relationships.
> (2) At least two years of experience in counseling or psychotherapy, or both, preferably in a setting related to the areas of responsibility of the family conciliation court and with the ethnic population to be served.
> (3) Knowledge of the court system of California and the procedures used in family law cases.
> (4) Knowledge of other resources in the community to which clients can be referred for assistance.
> (5) Knowledge of adult psychopathology and the psychology of families.
> (6) Knowledge of child development, child abuse, clinical issues relating to children, the effects of divorce on children, the effects of domestic violence on children, and child custody research sufficient to enable a counselor to assess the mental health needs of children.[168]

Apart from family disputes, California requires mediators of certain prisoner civil rights issues to "be a member in good standing of the Bar . . .

on the approved register of qualified mediators. LA. REV. STAT. ANN. § 9:4106B (West Supp. 1999).

166. *See* ROGERS & MCEWEN, *supra* note 5, app. B at 152-55.

167. CAL. R. OF CT. § 26(e).

168. CAL. FAM. CODE § 1815(a) (West 1994) (applying to mediators by reference of CAL. FAM. CODE § 3164 (West 1994)). *Compare* MICH. COMP. LAWS § 552.513(4) (1988) (a less rigorous domestic dispute which requires "(a) One or more of the following: (i) A license or a limited license to engage in the practice of psychology . . . or a master's degree in counseling, social work, or marriage and family counseling . . . (ii) Not less than 5 years of experience in family counseling . . . (iii) A graduate degree in behavioral science and successful completion of a domestic relations mediation training program with not less than 40 hours of classroom instruction and 250 hours of practical experience . . . (iv) Membership in the state bar of Michigan . . . (b) Knowledge of the court system of this state and the procedures used in domestic relations matters (c)Knowledge of other resources in the community to which the parties to a domestic relations matter can be referred for assistance (d) Knowledge of child development, clinical issues relating to children, the effects of divorce on children, and child custody research"); *and* KAN. STAT. ANN. § 23-602 (1995) (requiring only mediation training and knowledge of the judicial system with no degree requirement). *See also* Devine, *supra* note 162, at 201-07 (discussing existing standards of qualifications including skills testing, ethical codes and state laws).

with at least 10 years legal practice experience."[169] Under the California Water Code, disputes between a water supplier and water users may be mediated by a mutually agreeable mediator or selected from an appointed panel of "disinterested persons" through a process of elimination.[170] Finally, several other California statutes leave selection and qualifications of the mediator solely to the parties with no mandatory qualifications imposed.[171]

The propriety of set qualifications has been questioned. Some argue that instead of or perhaps in addition to training, mediators should be required to pass a performance test based on a mock mediation evaluation.[172] It is argued that a test would best evaluate the interactive skills of the mediator because the mediator's ability to investigate, display empathy, be inventive and persuasive, and avoid distractions is more important than any academic skills.[173] The cost of administering such a test is prohibitive however, and states have generally confined regulation to the imposition of qualification standards.[174]

The proponents of qualification standards argue that, unlike judges and arbitrators, mediators do not necessarily have either legal or area expertise to ensure the quality of the services they provide.[175] In addition, there is no "backup scrutiny of appellate review" to legitimize the function of the mediator.[176] In an attempt to ensure a certain level of quality, legislatures are urged to impose requirements on mediators, including certification, training, ethics codes and professional standards.[177] However, the "differing visions of what mediation is and should be translate into varying views about mediation training, qualifications, and ethics."[178] The only real consensus on what creates a qualified mediator is that "*something* is required."[179]

169. U.S. DIST. CT. RULES C.D. CAL., Pilot Prisoner Mediation Program.

170. CAL. WATER CODE § 1219 (West 1971).

171. *See, e.g.*, CAL. GOV'T CODE § 66031 (West 1997); CAL. CIV. PROC. CODE § 1775.6 (West 1982).

172. *Mandatory Mediation*, *supra* note 105, at 1101.

173. *Id.*

174. *Id.*

175. Kovach & Love, *supra* note 22, at 104. "Mediators in the early programs came from all walks of life. They were 'community organizers, business persons, attorneys, social workers, teachers, senior citizens, and homemakers.'" Harges, *supra* note 55, at 690.

176. Kovach & Love, *supra* note 22, at 104.

177. *Mandatory Mediation*, *supra* note 105, at 1101.

178. ROGERS & MCEWEN, *supra* note 5, § 2:04, at 19.

179. *See* Draft Dec. 1999, Reporter's Notes, *supra* note 1, § 4(a) (emphasis added). Note also that some scholars claim all that is required to be "qualified" is the ability to be impartial. *See* Silver, *supra* note 145, at 45.

B. Right to Representation

The third mediation procedure provision of the Draft Act ensures a party's right to be represented at a mediation proceeding.[180] It states that "[a] disputant has the right to have an attorney or other individual designated by the disputant attend and participate in the mediation. A waiver of this right may be revoked."[181] The drafters contend that an absolute right to representation is justified because "[t]he fairness of mediation is premised upon the informed consent of the disputants to any agreement reached."[182] Therefore, rather than allow the mediator to decide whether attorney representation is appropriate, the Draft Act leaves the decision to the disputants themselves.[183] In addition, under the Draft Act's language the disputants have the option to be represented by a non-lawyer.[184] The drafters claim that this will act as another tool to balance negotiating powers.[185]

There is some disagreement in the mediation community as to whether the attendance or absence of attorneys advances the quality of the mediation.[186] In favor of attorney representation, it is argued that by providing the information needed to make an informed decision about the resolution of a dispute, an attorney's presence aids the client.[187] In this view, attorneys "act as a crucial check against uninformed and pressured settlement . . . ."[188] An attorney can provide an opinion as to the strength of the other party's argument or the fairness of a proposal.[189] In addition, an attorney can speak for a nervous or intimidated client who is unable to forward his or her own position with confidence, thereby mitigating an imbalance of bargaining power among the parties.[190]

Further, as a method of increasing the use of mediation, it is argued that "encouragement of lawyer participation in mediation [i]s a means to influence lawyers to recommend mediation to their clients . . . ."[191] Once an attorney is aware of the advantages of mediation and the potential for faster, less

180. Draft Mar. 2000, *supra* note 1, § 9(c).

181. *Id.*

182. Draft Dec. 1999, Reporter's Notes, *supra* note 1, § 4(c) (citing Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 936-44 (1998)).

183. Draft Dec. 1999, Reporter's Notes, *supra* note 1, § 4(c).

184. Draft Mar. 2000, *supra* note 1, § 9(c); Draft Dec. 1999, Reporter's Notes, *supra* note 1, § 4(c).

185. Draft Dec. 1999, Reporter's Notes, *supra* note 1, § 4(c).

186. *See* ROGERS & MCEWEN, *supra* note 5, § 2:04, at 18-19.

187. *See* Rogers & McEwen, *Employing the Law*, *supra* note 28, at 854.

188. *Id.*

189. *See* Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 345-48 (1999).

190. *Id*.

191. *See* Rogers & McEwen, *Employing the Law*, *supra* note 28, at 853.

expensive dispute resolution, the attorney is more likely to encourage mediation over traditional litigation.[192] Therefore, some have concluded that having lawyers present can "protect against unfairness and, at the same time, the process makes them more effective at recommending mediation."[193]

Not all scholars advocate right to representation laws. Opponents claim that an attorney's presence detracts from the parties' ability to control the outcome of the dispute.[194] Mediation is said to "empower"[195] parties because it gives them control over the dispute resolution process. It is claimed that attorney presence reduces party empowerment due to "the presumed loss of control that results when lawyers 'take over' a case."[196] The split in views on the propriety of right to representation laws has resulted in a split in state statutes. Some state regulations uphold the right to representation in mediation negotiations[197] while others mandate the absence of all non-parties to the dispute.[198] The differences often depend upon the nature of the dispute; however, even within one category of dispute, namely domestic mediation, there is no real consensus among the states.[199]

Mediation of family disputes is one example of the disparity in right to representation laws. Kansas expressly allows only the parties to attend mediation sessions concerning domestic disputes.[200] Other states, California and South Dakota for instance, do not entirely exclude attorneys from domestic mediations, but give the mediator the authority to exclude attorneys if the mediator so chooses.[201] Alaska and North Dakota statutes prohibit a mediator from excluding an attorney.[202] Regardless, it has been noted that even where allowed, "lawyers for the parties [in family disputes] do not attend

192. *Id.* at 844.

193. *Id.* at 854.

194. *See* ROGERS & MCEWEN, *supra* note 5, § 2:04, at 18-19.

195. *Id.*

196. *Id.* (citing ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994)).

197. *See, e.g.*, ALASKA STAT. § 25.24.060(c) (Michie 1998).

198. *See, e.g.*, MO. REV. STAT. § 162.959(9) (Supp. 1999) (prohibiting attorney participation at special education mediation sessions).

199. ROGERS & MCEWEN, *supra* note 5, § 12:02, at 3 (discussing "prolawyer and antilawyer sentiments" in domestic dispute mediation).

200. KAN. STAT. ANN. § 23-603(6) (1995).

201. *See* CAL. FAM. CODE § 3182(a) (West 1994) (allowing the mediator of custody and visitation disputes to exclude counsel "if, in the mediator's discretion, exclusion of counsel is appropriate or necessary"); S.D. CODIFIED LAWS § 25-4-59 (Michie 1999) (stating that the mediator may exclude counsel from divorce and separate maintenance mediation proceedings).

202. The Alaska statute for divorce and annulment states that counsel for the parties may attend all mediation conferences. ALASKA STAT. § 25.24.060(c) (Michie 1998). The North Dakota statute states "the mediator may not exclude counsel from participation in the [contested child] mediation proceedings." N.D. CENT. CODE § 14-09.1-05 (1996). *See also* OR. REV. STAT. § 107.785(1) (1983); WIS. STAT. § 767.11(10)(a)(West 1993).

mediation . . . ."[203] In fact, "only 14% of domestic court mediation programs . . . report that lawyers attend most mediation sessions."[204] In any event, as with other forms of regulation for quality mediation, right to representation laws vary depending upon the state and the type of dispute.

C. Mediator Immunity

Previous versions of the Draft Act purported to ensure quality mediation through a mediator immunity clause.[205] The first version of the Draft Act approached the issue from the standpoint of contractual disclaimers, also known as exculpatory agreements.[206] It stated: "Unless immunity from liability is extended to mediators by common law, rules of court, or other law of this State, a contractual term purporting to disclaim a mediator's liability is void as a matter of public policy."[207] However, later versions of the Draft Act narrowed the provision from allowing immunity in any context covered by state common or statutory law to only common law judicial immunity for court-connected mediators. These provisions stated that "[u]nless mediators fall within common law protections extending judicial immunity, no immunity may be extended to mediators specifically for their conduct related to mediation . . . ."[208] The immunity provision has since been eliminated entirely from the Draft Act.[209]

In the earlier versions, the drafters claimed to take an approach which "diminishe[d] any non-judicial immunity that a mediator may enjoy under current state law," thereby putting mediators "on the same footing as lawyers

203. ROGERS & MCEWEN, *supra* note 5, § 12:02, at 3.

204. ROGERS & MCEWEN, *Employing the Law*, *supra* note 28, at 864 n.134.

205. Draft Jan. 2000, *supra* note 1, § 3(b).

206. An exculpatory agreement is one which "releases one of the parties from liability for his or her wrongful acts." BLACK'S LAW DICTIONARY 566 (6th ed. 1990).

207. Draft June 1999, *supra* note 1, § 4(b). It is common for exculpatory agreements to be deemed against public policy in contexts other than mediation. *See* Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. ON DISP. RESOL. 47, 77 (1986) (noting that "granting of an immunity is a matter of public policy that balances the social utility of the immunity against the social loss of being unable to attack the immune defendant"). In Wisconsin, for instance, the supreme court has enumerated circumstances in which an exculpatory agreement will never be enforceable. Alexander T. Pendleton, *Enforceable Exculpatory Agreement*, 70 WIS. LAW. 10, 11 (Nov. 1997). Such circumstances include excuse of intentionally or recklessly inflicted harm, an employer's liability for injury to an employee in the course of the employee's employment, liability by a party "charged with performing a service of great importance to the public," and liability of a party with a decisive advantage in bargaining strength. *Id.*

208. Draft Jan. 2000, *supra* note 1, § 3(b). The provision also states that "in an action against a mediator arising out of conduct of the mediation session, reasonable attorney's fees and other expenses of litigation may be awarded to a prevailing defendant." *Id.*

209. *See* Draft Mar. 2000, *supra* note 1.

who are prohibited by professional ethics from disclaiming liability."[210] They claimed that "mediators who disclose in violation of statutory provisions, who hide conflicts of interest, or who exclude legal counsel from the sessions over the objection of disputants should be accountable to disputants who are hurt."[211] However, the drafters further contended that court-connected mediators pose less of a threat of lack of accountability than private mediators due to court supervision; therefore, they initially did not object to common law immunity for judicial mediators.[212]

Some mediation scholars argue that mediating parties are protected by liability imposed through traditional tort and contract causes of action.[213] A party dissatisfied with a mediator's services may have an action for false advertising, breach of contract, slander, breach of fiduciary duty, negligent performance of duties, defamation or deceptive practice.[214] Professor Arthur A. Chaykin[215] argues that with the increased use of mediation, the various types of disputes mediated, and the often emotional or hostile disputes mediators face, it is inevitable that mediators will be sued.[216] The imposition of liability can have a "salutory impact on an industry, assuring that certain levels of quality are maintained . . . ."[217] Therefore, he argues that special immunities for mediators are likely unnecessary.[218]

Despite the potential need advocated by some mediation scholars to ensure quality mediation through mediator liability,[219] several states have enacted mediator immunity laws negating any liability that may have applied. For example, Arizona law states that "a mediator is not subject to civil liability except for those acts or omissions that involve intentional misconduct or reckless disregard of a substantial risk of a significant injury to the rights of others."[220] As part of a general Courts and Civil Proceedings statute, the law governs all mediation "pursuant to law, a court order or a voluntary decision of the parties."[221]

Many immunity statutes apply only to court-connected mediation. For example, the Colorado Dispute Resolution Act creates judicial dispute

210. *See* Draft Dec. 1999, Reporter's Notes, *supra* note 1, § 4(b).

211. *Id.*

212. *Id.*

213. Chaykin, *supra* note 207, at 50-51.

214. *Id. See also* Cassondra E. Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 OHIO ST. J. ON DISP. RESOL. 629, 630 (1997).

215. Professor Chaykin is an Associate Professor of Law at Northern Illinois University College of Law. *See* Chaykin, *supra* note 207, at n.a.

216. *Id.* at 50.

217. *Id.*

218. *Id.*

219. *See generally id.*

220. ARIZ. REV. STAT. § 12-2238 (1994).

221. *Id.*

resolution programs and provides that the liability of such mediators "shall be limited to willful or wanton misconduct."[222] Likewise in both Illinois and Utah, medical mediation board members are shielded from liability by an immunity statute except in the event the mediator acted in bad faith, with malicious intent, or exhibited willful disregard for rights, safety, or property of another.[223]

In Iowa, a narrow mediator immunity statute prevented a party from bringing a negligence action against a Farm Mediation Service member where it was alleged that improper notice of the mediation was given denying the parties a fair opportunity to participate in foreclosure proceedings on their agricultural property.[224] The complaint was dismissed for failure to state a claim due to the Iowa statute limiting farm mediation staff liability to actions in "bad faith, with malicious purpose, or in a manner exhibiting willful and wanton disregard of human rights, safety, or property."[225]

Like most immunity laws, the Arizona, Colorado, Utah, Illinois and Iowa statutes mentioned make an exception for reckless, willful misconduct.[226] On the contrary, under California law for international commercial disputes the mediator is expressly not held liable "in an action for damages resulting from any act or omission in the performance of his or her role," with no such exception given.[227]

In addition to statutory protections, some courts protect mediators through the common law absolute quasi-judicial immunity doctrine.[228] In Florida, any court-appointed mediator is granted judicial immunity "in the same manner and to the same extent as a judge."[229] A California court extended absolute quasi-judicial immunity to a psychologist who acted as a neutral third-party mediator in a child custody and abuse case.[230] The court noted the need for alternative dispute resolution techniques to free-up clogged court schedules.[231] It stated that the job of a mediator is not as an advocate; rather it "involves

222. COLO. REV. STAT. § 13-22-305 (1997).

223. UTAH CODE ANN. § 78-14-15 (1996) (governing medical malpractice mediation boards); 225 ILL. COMP. STAT. 100/4 (West 1998) (mediation committee members for podiatric medical boards are exempt from civil liability damages except for willful or wanton misconduct).

224. Postma v. First Fed. Sav. & Loan of Sioux City, 74 F.3d 160 (8th Cir. 1996).

225. *Id.* S*ee also* IOWA CODE § 13.16 (1995).

226. *See* ARIZ. REV. STAT. § 12-2238; COLO. REV. STAT. § 13-22-305; UTAH CODE ANN. § 78-14-15; 225 ILL. COMP. STAT. 100/4; IOWA CODE § 13.16.

227. CAL. CIV. PROC. CODE. § 1297.432 (West 1982).

228. *See* Chaykin, *supra* note 207, at 52-54 (discussing judicial immunity for mediators). *See also* Wagshal v. Foster, 1993 No. 92-2072 WL 86499 (D.D.C. Feb. 5, 1993). The *Wagshal* court stated that mediators "who are directly involved in ADR programs with express authority from the court may invoke the same protection" as the court. *Id.* at *2.

229. FL. STAT. ANN § 44.107 (West 1997).

230. Howard v. Drapkin, 222 Cal. App. 3d 843, 848 (2nd Dist. 1990).

231. *Id.* at 857.

impartiality and neutrality, as does that of a judge . . . hence, there should be entitlement to the same immunity given others who function as neutrals in an attempt to resolve disputes."[232] The court therefore held that "absolute quasi-judicial immunity is properly extended to these neutral third-parties for their conduct in performing dispute resolution services which are connected to the judicial process and involve . . . the arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes."[233]

The many statutes and judicial doctrines that grant immunity to mediators have led to the criticism that broad mediator immunity acts to "shield 'bad' mediator opinions" and creates a lack of professional accountability by mediators.[234] Some have contended that the common law provides important protection for mediating parties and additional immunity legislation will not aid the quality of mediation as a whole.[235]

IV. CRITICAL ANALYSIS: WILL THE DRAFT ACT WORK?

It is clear that the excessive regulation of mediation, over 2000 mediation related statutes,[236] is confusing and unnecessary. Therefore, it is difficult to argue against any attempt at simplification and unification. However, the process of simplifying and unifying mediation regulation is complex and warrants a detailed look at exactly what it is that a uniform act should regulate and how it should be done.

The Draft Act purports to regulate all mediation except the very simplest form where a mutual acquaintance aids two disputing persons in resolving an argument with no formalities (and likely without even the knowledge that a "mediation" is taking place).[237] However, if the disputing parties enter into a written or electronically recorded agreement to have the mutual acquaintance aid in resolution of their dispute, then the Draft Act would apply.[238] It also purports to apply where disputing parties seek the aid of someone who holds themselves out to be a mediator by trade.[239] In such cases, the mediator is very likely to require a mediation agreement prior to offering services.[240]

In both of these situations, the agreement entered into is voluntary and expresses what the parties intend to be the goals and procedures of the mediation sessions. The contract could be comprehensive and cover issues such as confidentiality and attorney presence or it could merely state that the

232. *Id.* at 860.
233. *Id.*
234. Kovach & Love, *supra* note 22, at 104.
235. *See* Chaykin, *supra* note 207.
236. ROGERS & MCEWEN, *supra* note 5, § 13.01.
237. *See supra* text accompanying notes 100-04.
238. *See* Draft Mar. 2000, *supra* note 1, § 3 (definitions).
239. *See id.*
240. *See* Devine, *supra* note 162, at 192.

parties have agreed that the mediator is their choice to aid in resolving their dispute. Either way, the contract reflects the voluntary nature of the process.[241]

The need for regulation when a contractual relationship governs seems to be superfluous and unnecessary. Contracting parties may not be aware that in addition to the contract entered into, regulations govern their mediation agreement. If anything, this would add confusion to parties attempting to seek enforcement of the contract or damages for breach of it. Further, as argued by many, the business world, supply and demand, and the traditional aspects of contract and tort law are likely sufficient to ensure that the parties to a contractual mediation receive fair and satisfying services.[242]

Few states have attempted to regulate private mediation.[243] Therefore, if the goal of the Draft Act is to "replace the hundreds of pages of complex and often conflicting statutes across the country with a few short pages of simple, accessible, and helpful rules,"[244] as the drafters contend, then the Draft Act goes too far. Regulating the private use of mediation will likely not "enhance . . . the expanded use of mediation"[245] as hoped, but will interfere with a private contractual process that has inherent protections.

The problem can be easily fixed by altering the Draft Act's definitions of "disputant"[246] and "mediator"[247] as follows (with suggested deletions in brackets):

> "Disputant" means a person who participates in mediation and:
>
> (1) has an interest in the outcome of the dispute or whose agreement is necessary to resolve the dispute, and
>
> (2) is asked by a court, government entity, or mediator to appear for mediation [or entered an agreement to mediate that is evidenced by a record].
>
> "Mediator" means an impartial individual of any profession or background, who is appointed by a court or government entity [or engaged by disputants through an agreement evidenced by a record].

241. *See* Stulberg, *Theory and Practice*, *supra* note 76, at 88-89 (stating that "the mediation process is non-compulsory . . . [therefore], if the parties do not want to negotiate, the triggering mechanism for the entry of the mediator is absent").

242. *See* Chaykin, *supra* note 207, at 52-54.

243. *See supra* text accompanying notes 105-07. *But see* ARIZ. REV. STAT. § 12-2238 (1994) (regulating mediation where "[b]efore or after the filing of a complaint, mediation may occur pursuant to law, a court order or a voluntary decision of the parties").

244. Reuben & Rogers, *supra* note 1, at 18.

245. *See* Getty et al., *supra* note 90 (stating that the goal of the uniform mediation project is to "enhance, rather than interfere with, the expanded use of mediation and contribute to improving its effectiveness").

246. *See* Draft Mar. 2000, *supra* note 1, § 3(a).

247. *Id.* § 3(d).

The deletion of any reference to voluntary mediation agreements free from court order or referral would remove the private mediation context from the umbrella of the Draft Act. With these small changes, the Draft Act would more closely mirror the dispute contexts generally regulated by the states and would therefore advance the goals of clarifying and simplifying existing mediation law.[248]

In addition to private mediation, many parties also find themselves engaged in mediation due to court referral or court order.[249] In such cases, a new dimension to the expectations of the parties may arise. The parties have already chosen the litigation process, but by virtue of the aspects of their dispute, it was referred or ordered to mediation in an attempt to be resolved by a mutual agreement rather than a court's decision.[250] When a mediation referral or order occurs, it appears that the court has an inherent duty to ensure that the time and efforts of the parties are not wholly in vain.[251] For this reason, certain procedural guidelines seem necessary and prudent.

In practice, court-connected mediation is the context for which nearly all existing state regulation applies.[252] If the Draft Act provides the states a very basic structure and narrowly applicable guidelines as to court-connected mediation procedures, it will be a useful tool. States that already have mediation legislation can repeal superfluous provisions and refer to the uniform law with supplementation for dispute-specific issues. States with minimal mediation legislation will have a solid, organized base upon which to build a concise body of law.

As can be seen by the discussion of various state laws in the previous sections of this Comment, few states have left court-connected mediation unregulated.[253] On the other end of the spectrum, states such as California have hundreds of mediation statutes already in existence.[254] As an accommodation to this wide variance, the mediation procedure provisions of the Draft Act[255] are well chosen areas of regulation for court-connected mediation. Disclosure and representation rights are areas already regulated by the states[256] and would therefore benefit from uniformity. However, the states

248. *See* Draft Dec. 1999, Reporter's Notes, *supra* note 1, § 1 (stating that the "guiding purpose of the drafting effort was to provide a simple and clear statute that would serve the interests of promoting the use, effectiveness, fairness and integrity of mediation . . .").

249. *See generally* KOVACH, *supra* note 21, at 48 (discussing mandatory referral).

250. *Id.* (noting that many states require courts to determine the appropriateness of a case for mediation prior to making a referral).

251. *See* Devine, *supra* note 162, at 206 (discussing the implications of mandatory mediation).

252. *See supra* text accompanying notes 105-07.

253. *See* Section III.

254. *See* ROGERS & MCEWEN, *supra* note 5, app. B at 152-55.

255. *See* Draft Mar. 2000, *supra* note 1, § 9.

256. *See supra* text accompanying notes 145-204.

also highly regulate immunity, but the issue is not addressed in the current version of the Draft Act. Following, the disclosure, representation and immunity provisions will be discussed in turn.

A. The Disclosure Provisions

The current version of the Draft Act requires disclosure of conflicts of interest[257] and, upon request, disclosure of qualifications.[258] Comparing the Draft Act to state disclosure laws reveals three issues: (1) the burden for qualification disclosure is on the parties; (2) the parties have no guide as to what qualifies a mediator; and (3) relevant conflicts of interest are not enumerated.

The first issue pertains to the disclosure of mediator qualifications. Where the parties contract freely to have a particular mediator aid in resolution of their dispute without court intervention, the inherent nature of the contract is that the parties believe the mediator is qualified.[259] Before agreeing, the parties have every opportunity to determine the mediator's qualifications, and if disclosure is withheld, the parties are free to refrain from entering into the contract. However, where the mediator is court-appointed, unknowing and unrepresented parties may assume that the mediator is qualified or would not have been appointed for their dispute.[260] Therefore, the disclosure provision is less pertinent in a private mediation context than one involving a court-connected mediator.

Where the Draft Act's disclosure provision does apply, as written, it places the burden of requesting disclosure on the parties.[261] The few states that require disclosure of qualifications put the burden on the mediator rather than the parties.[262] For instance, Louisiana requires that a mediator provide information regarding professional qualifications and fees upon receiving notice of appointment as a mediator.[263] Requiring disclosure upon appointment places the mediator's qualifications immediately out in the open for the parties' review, and there can be no surprises for a party who did not know or did not think of asking until a problem arose or confidence fell.

257. Draft Mar. 2000, *supra* note 1, § 9(a).

258. *Id*. § 9(b).

259. *See* Devine, *supra* note 162, at 192 (discussing the process of mediation and the importance of an introduction and agreement to mediate when the mediation is entered into voluntarily).

260. *See generally Mandatory Mediation*, *supra* note 105, at 1101 (stating that quality control is required in the context of mandatory mediation). *See also* Harges, *supra* note 55, at 714 (acknowledging that "states have a duty to ensure the quality of the individuals who serve as mediators").

261. *See* Draft Mar. 2000, *supra* note 1, § 9(b).

262. *See supra* text accompanying notes 159-61.

263. LA. REV. STAT. ANN. § 9:4107(B) (West Supp. 1999).

Although the Draft Act properly requires disclosure of qualifications for court-connected mediators, placing the burden to request such disclosure on the parties is not justified. Disclosure by the mediator early in the mediation process would aid in developing trust and the parties would more likely feel confident from the beginning that the mediator will be able to aid them in resolving their disputes.[264] The potential damage that could be caused by unqualified mediators, time delays and increased costs for example, would be avoided by early, mandatory disclosure.

The second issue is the Draft Act's failure to address what education and experience ensure a qualified mediator.[265] The issue is quite controversial and very complex when the numerous and varied types of disputes are taken into account.[266] In addition, there is no convincing evidence as to what makes a good mediator.[267] Therefore, the drafters are likely correct in avoiding an identification of strict standards. Moreover, states may be reluctant to adopt a uniform act that drastically increases or decreases the minimum qualifications of mediators, and further, the mediation profession as a whole may be uprooted if across the board standards were suddenly and indiscriminately enacted. Nonetheless, among states with qualification standards there is consensus that some form of mediation or dispute resolution training increases mediator competency.[268] Further, states generally agree that some experience or education in the field of the dispute is necessary.[269] Most domestic disputes, for example, require some knowledge of social work, psychology, or counseling techniques.[270] Some states have responded with mediation qualification standards requiring relative education or experience.[271]

The problem posed by the Draft Act's lack of standards is that with no standard for comparison, even when the parties request disclosure, there is no way for the parties to know if the qualifications are sufficient. Therefore, it could be suggested that some reference to minimum standards should be included in the Draft Act. However, since the goal of the Draft Act is to only regulate those areas common to all mediation,[272] it would be more beneficial for the Draft Act to remain silent on the issue of qualifications, as it presently

264. *See generally* Guthrie & Levin, *supra* note 24 (discussing party satisfaction).

265. *See* Harges, *supra* note 55, at 687; Draft Mar. 2000, *supra* note 1, § 9(b).

266. *See* Harges, *supra* note 55, at 687 (discussing the controversy of mediator qualifications).

267. *Id.*

268. *See supra* note 179 and accompanying text.

269. *Id.*

270. *See* Harges, *supra* note 55 (discussing the rise of mental health professionals as mediators to domestic disputes).

271. *Id.*

272. *See* Draft Dec. 1999, Reporter's Notes, *supra* note 1, § 1.

does, and allow the states to establish subject-specific qualifications when necessary or prudent.

Third is the issue of disclosure of conflicts of interest. Unlike qualifications disclosure, conflicts of interest disclosure is more heavily regulated among the states, and the burden to disclose is normally on the mediator.[273] State regulations go so far as to require a mediator to withdraw from the mediation if a conflict of interest either makes the mediator believe that impartiality is impossible or causes a party to request withdrawal.[274]

The initial version of the Draft Act did not require disclosure of conflicts of interest unless, or until, a party or party representative requested disclosure.[275] Placing the burden on the parties to request disclosure of conflicts of interests, as the initial version of the Draft Act did, may have led to disruptions and a lack of confidence in the mediation process when a party gained knowledge part way through the process that the mediator had a conflict of interest. Therefore, the revisions in the current version of the Draft Act requiring automatic disclosure of a potential conflict of interest, without a specific request by a party,[276] was a positive change.

However, the remaining problem is that the Draft Act does not list potential conflicts of interest that must be expressly denied or disclosed by mediators. An improvement, following the guide of the Model Standards of Conduct for Mediators,[277] would be to outline specifically what information must be disclosed and require the mediator to expressly state whether the identified conflicts exist or not.

B. Ensuring the Right to Representation

The right to representation provision[278] is the sole mediation procedure issue in which the Draft Act clearly answers a split in opinion among the states. Although several states exclude attorneys at domestic mediations or leave the decision to the discretion of the mediator,[279] the Draft Act provision would provide a uniform right ensuring that the parties have control over their representation regardless of the type of dispute.

There may be criticism that this provision is self-serving for the legal profession; however, it will provide many benefits for mediating parties. Primarily, if a party feels more confident and is more likely to participate in mediation if counsel is welcomed, then the goals of mediation are advanced.[280]

273. *See supra* text accompanying notes 146-57.
274. *See, e.g.*, S.D. CODIFIED LAWS § 25-4-58.2 (Michie 1999).
275. Draft June 1999, *supra* note 1, § 4(a).
276. *See* Draft Mar. 2000, *supra* note 1, § 9(a).
277. *See* Feerick, *supra* note 10, at 480.
278. Draft Mar. 2000, *supra* note 1, § 9(c).
279. *See supra* text accompanying notes 200-03.
280. Sternlight, *supra* note 189, at 345.

Counsel may be able to advise a mediating party as to the appropriate qualifications of a mediator and whether a perceived conflict of interest is an issue. Counsel may also even the bargaining power between two parties, such as divorcing spouses, where one party naturally exerts influence over the other. In addition, counsel will be better equipped than an unrepresented party to evaluate an agreement reached through mediation if present at the negotiations.[281]

Potential problems may arise when one party is represented and the other is not due to financial constraints. In that instance, the bargaining power may actually be unbalanced due to the presence of counsel for only one side. The Draft Act's broad language upholding the right of non-legal representation[282] may mitigate the problem. Having a professional counselor, well-trusted friend, or other non-legal advocate at the mediation sessions will allow a party without legal representation to build confidence and benefit from a second opinion. Therefore, the right to representation provision appears to be a step in the right direction for quality mediation.

Again, the distinction between private mediation and court-connected mediation can be raised. In a private mediation, if the parties disagree as to whether attorneys should be present or not, the consequence is that the mediation will not go forward. In a court-connected mediation, however, the consequence may be either an unsuccessful mediation because one party refuses to agree to a settlement or an unfair settlement because the parties were not fully informed prior to agreement. In both cases, ensuring a party's right to representation mitigates the effects of wasted time or an unfair settlement. If the parties chose litigation first but were referred or ordered to mediation, a disallowance of representation would be inconsistent with the parties' initial choice to be represented by counsel.

C. The Lack of Limits on Mediator Liability

The current version of the Draft Act fails to address mediator liability and immunity issues. Previous versions allowed common law judicial immunity for court-connected mediators.[283] In addition, the initial versions denied all immunity including exculpatory agreements and statutory immunity laws for private mediators who were therefore held fully responsible to the extent that civil liability allows.[284] Unlike the other provisions of the Draft Act which put

281. *See id.* at 345 (stating that "lawyers often have an important role to play in protecting their clients during the course of a mediation and ensuring that any agreement that is reached is fair to the client or otherwise appropriate").

282. *See* Draft Jan. 2000, *supra* note 1, § 3(c).

283. *See id.* § 3(b).

284. *See* Draft Jan. 2000, *supra* note 1, § 3(b).

private mediators and court-connected mediators on similar ground, the deleted immunity provisions made a prominent distinction.[285]

In their protection of court-connected mediators, the previous versions of the Draft Act appeared to overlook the fact that many states provide for statutory immunity in addition to common law judicial immunity.[286] Many state statutes grant full immunity to court-connected mediators with the exception of willful, wanton or reckless conduct.[287] Statutory immunity grants more certainty to mediators and mediating parties than common law immunity insofar as there is no question as to whether it applies once enumerated in a statute. It is claimed that court-connected mediators are more likely to be accountable for their actions due to court supervision;[288] if this was the justification for upholding common law immunity for court-connected mediators, then the denial of statutory immunity would have been unwarranted.

For private mediators, the marketplace and contract or tort laws are necessary checks on mediator accountability due to the absence of similar supervision and guidance provided in a court-connected context.[289] The potential for claims of false advertising, breach of contract, fraud, invasion of privacy, defamation, and malpractice, holding mediators liable for their conduct, serve as necessary assurances of quality mediation.[290] Therefore, the prohibition on immunity for private mediators in the previous versions of the Draft Act was proper. However, because many states prohibit the use of exculpatory agreements in most contexts for public policy reasons[291] an express prohibition on the use of such agreements should have been included in the Draft Act. Exculpatory agreements eliminate the check that tort and contract liability supply and would therefore act conversely to the goal of quality mediation.

Leaving the liability issue completely unaddressed, as the current version of the Draft Act does, contradicts the attempt to unify mediation regulation among the states. As was discussed previously, several states have mediator immunity laws and the variance in scope and application is great. Fine-tuning the provision to recognize the existing statutory as well as common law immunity for court-connected mediators and expressly prohibiting immunity

285. *Compare id.*, *with* Draft Jan. 2000, *supra* note 1, §§ 3(a), 3(c).

286. *See* ARIZ. REV. STAT. § 12-2238; UTAH CODE ANN. § 78-14-15 (b) (1994); 225 ILL. COMP. STAT. ANN. 100/4 (West 1998); *and supra* text accompanying notes 219-27.

287. *See supra* text accompanying notes 219-27.

288. *See* Draft Dec. 1999, Reporter's Notes, *supra* note 1, § 4(c).

289. *See supra* text accompanying notes 213-18.

290. *See* Chaykin, *supra* note 207, at 51-52.

291. *See* Pendleton, *supra* note 207 (discussing Wisconsin's general prohibition against exculpatory agreements).

for private mediators may be a greater step towards uniformity than eliminating the provision in its entirety.

IV. CONCLUSION

The uniform mediation project is an effort to be commended. It evolved from the institutionalization of mediation in the mid-1900s and the resulting abundance of state regulation that exists today.[292] It is apparent that over 2000 mediation related statutes[293] are too many for a process praised for simplicity and informality. Any attempt to reduce the complexity should be greatly supported.

However, the drafting of a uniform act for mediation is a delicate process. A focus on the proper contexts to which a uniform act should apply is imperative. This Comment has presented the argument that because private mediation is based on a voluntary agreement to mediate and is sufficiently protected by contract and tort law, the Draft Act need not regulate arenas of mediation beyond court-connected mediation. This position is further advanced by the fact that most state statutes are limited to court-connected mediation scenarios.

In the context of court referred or court ordered mediation, the Draft Act takes positive steps to ensure a quality process by providing for mediator disclosure and the right to representation.[294] The disclosure provision makes a good effort at reducing conflicts of interest and providing for qualified mediators; however, it may be more effective if the burden for disclosure is shifted to the mediator rather than the parties. The right to representation provision properly ensures that an attorney or other representative may accompany mediating parties if desired. Finally, altering rather than eliminating the immunity provision in order to recognize the existing state statutes providing court-connected mediator immunity should be considered.

The task of commencing and culminating the Draft Act project was and continues to be an awesome one. Clearing the clutter of mediation regulation will require more than the predicted finalization of the Draft Act by the NCCUSL and ABA in February 2001. The real test of its success in eliminating the plethora of mediation regulation will only be realized when the Draft Act is forwarded to the states for adoption. Until then mediation regulation will remain in its unorganized, overlapping, incoherent and incomplete state.

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292. *See* Section II.

293. ROGERS & MCEWEN, *supra* note 5, § 13:01.

294. *See* Draft Mar. 2000, *supra* note 1, § 9.